

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re: Petition of City of Waltham

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D.T.E. 02-11

**REPLY TO THE RESPONSE OF THE CITY OF WALTHAM TO THE MOTION
TO DISMISS OF BOSTON EDISON COMPANY**

I. INTRODUCTION

On January 24, 2002, the City of Waltham (“Waltham”) filed a Petition (the “Petition”) with the Department of Telecommunications and Energy (the “Department”), requesting that the Department direct Boston Edison Company, d/b/a NSTAR Electric (the “Company”), to recalculate its purchase price for municipal streetlights sold by the Company to Waltham (Exh. W-1, at ¶ 14). On April 11, 2002, during a hearing held by the Department in this proceeding, the Company moved that the Department dismiss the Petition (the “Motion to Dismiss”).

On April 18, 2002, Waltham filed with the Department a Response to the Company’s Motion to Dismiss (the “Waltham Response” or the “Response”). However, Waltham has failed to justify why the Company’s Motion to Dismiss should be denied. Moreover, over the course of this proceeding, Waltham has also failed to support its allegations regarding the purchase price for Waltham’s streetlights with any evidence, testimony or presentation of alternative allocation methodologies and, accordingly, the Petition should be dismissed for failure to state a claim upon which relief may be granted. It should be noted that, throughout this case, the Company has repeatedly asked Waltham to state the basis for its claim for relief and to put forward and support a proposal for an alternative methodology and calculation of the value of streetlights sold to Waltham. If

there is to be a resolution of a “dispute,” the Company must have some notice of the basis of the dispute and the claim that is being made against it. In the interest of moving the case forward, the Company did not file a motion to dismiss early in the proceeding, since the Department was giving Waltham every opportunity to supplement its case, both prior to and during the evidentiary hearing. The Company moved to dismiss the action only after Waltham’s witness completed his testimony, and the last of a series of opportunities for Waltham to supplement its filing had expired. As described below, Waltham has made no claim, other than vague and unsupported references to unfairness, and there is no cognizable dispute for the Department to resolve. Accordingly, and for the reasons describe below, the Petition should be dismissed.¹

II. ARGUMENT

A. The Company Is Entitled to Move to Dismiss This Proceeding.

Rather than deal with the substance of the Motion to Dismiss, the majority of Waltham’s response is a long argument that the Company is not entitled to ask for dismissal of the Petition because the proceeding was instituted under the provisions of G.L. c. 164, § 34A. Waltham claims in its Response that the Company does not have the right to move to dismiss this proceeding based on an allegation that the Company is not a “party” to this proceeding (Waltham Response at 1). Specifically, Waltham claims that:

The motion to dismiss in the Department’s regulation is a right given to “parties” at 220 CMR 1.06(e). “A party may move at any time after the submission of an initial filing for dismissal . . .” The Department regulations define the term “party” at 220 CMR 1.03(2) as follows: “party means (a) the specifically named persons whose legal rights, duties or privileges are being determined in an *adjudicatory proceeding before the Department . . .*” (emphasis added by Waltham).

¹ Alternatively, because the case did proceed to hearings, the Department could treat the Company’s Motion to Dismiss as a motion for summary judgment and similarly reject the Petition.

Waltham Response at 1.

Waltham's allegation is without merit because: (1) the Company may move to dismiss this proceeding, or make any other motion, regardless of whether the Company is a "party" to the proceeding, pursuant to the discretion of the Hearing Officer; and (2) in any event, the Company is a party to this proceeding and, thus, may move to dismiss the proceeding pursuant to 220 C.M.R. 1.06(e).

1. The Hearing Officer Has Discretion to Allow the Company to Move to Dismiss This Proceeding.

Contrary to Waltham's argument, the Company may move to dismiss Waltham's Petition in this proceeding regardless of whether the Company is deemed a "party" pursuant to 220 C.M.R. 1.03(2). The Department's regulations provide that the Hearing Officer in a Department proceeding has the discretion and authority to make "all decisions regarding the admission or exclusion of evidence or any other procedural matters which may arise in the course of [a] hearing." 220 C.M.R. 1.06(a). The discretion of the Hearing Officer to allow motions to be made and considered is not limited by the language in 220 C.M.R. 1.06(e), which provides for motions to dismiss by parties to a proceeding. The language in 220 C.M.R. 1.06(e) is permissive and does not prohibit motions to dismiss by other participants in Department proceedings. Accordingly, at the discretion of the Hearing Officer, the Company may move to dismiss this proceeding whether or not the Company is deemed to be a "party" to the proceeding pursuant to 220 C.M.R. 1.03(2).

2. The Company Is a Party in This Proceeding and May Move to Dismiss the Proceeding Pursuant to 220 C.M.R. 1.06(e).

The opening sentence of Waltham's Petition states: "Pursuant to G.L. c. 164, § 34A, the City of Waltham hereby petitions the Department of Telecommunications and Energy to resolve a dispute between the City and NSTAR...". As the named respondent in the action brought by Waltham, the Company is at a loss to understand how it is not considered to be a party to the case. In any event, it is clear that the Company meets the Department's definition of "party" provided in 220 C.M.R. § 1.03(2). The Department's regulations, consistent with state law, define a "party" as follows:

(a) the specifically named persons whose legal rights, duties or privileges are being determined in an adjudicatory proceeding before the Department; (b) any other person who as a matter of constitutional right or by any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding and who enters an appearance; (c) any other person allowed by the Department to intervene as a party.

Id. at § 1.03(2). The Company meets the Department's definition of "party" under subsection (a) of 220 C.M.R. 1.03(2), as discussed below. Specifically, the Company is a party to this proceeding under 220 C.M.R. 1.03(2) because: (1) its legal rights are being determined in this proceeding; and (2) the proceeding is an "adjudicatory proceeding" as defined in G.L. c. 30A, § 1(1). This proceeding meets the definition of an "adjudicatory proceeding" under G.L. c. 30A, § 1(1) because the Company's legal rights are required by constitutional right and by the General Laws to be determined after opportunity for an agency hearing, as described below.

a. The Company's Legal Rights Are Being Determined in this Proceeding.

Waltham has alleged that the Company's method of allocating its costs for its streetlighting investment in Waltham resulted in a price for such lights that is "unfair,"

i.e., too high (Exh. W-1, at ¶ 14). As relief for this alleged action by the Company, Waltham has petitioned the Department to:

direct the Company to recalculate their purchase price by allocating a percentage of the net investment in accounts 632, 633, 634 and 637 to account 636 in a fashion that is rationally and equitably based on the percentage of “Account 636” streetlight equipment in the City...[and] direct the Company to rebate to the City the difference between the purchase price already paid, and the purchase price calculated in accordance with the Department’s determination in this proceeding.

(id. at ¶¶ 15, 16). Although Waltham’s requested for relief is so vague as to warrant dismissal as discussed below, it is clear that Waltham is requesting that the Department direct the Company to charge a lower price for Waltham’s streetlights which it was required by law to sell to Waltham. Accordingly, the Department is determining the property rights of the Company in this proceeding because a Department ruling affects: (1) the methodology used by the Company to determine its prices for streetlights sold to municipalities; (2) the price paid for such streetlights; and (3) the streetlight investment-related costs remaining on the Company’s books subject to recovery from the Company’s remaining customers. Therefore, the Company’s legal rights are clearly at issue in this proceeding.²

b. This Proceeding Is an “Adjudicatory Proceeding” as Defined in G.L. c. 30A, §1(1).

The Department defines the term “adjudicatory proceeding” consistent with G.L. c. 30A, § 1(1), which states that:

“Adjudicatory proceeding” means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.

² Pursuant to G.L. c. 4, § 7, clause 23, the term “person” includes corporations and, thus, the Company may be defined as a “specifically named person” pursuant to G.L. c. 30A, § 1(1).

This proceeding meets the definition of an “adjudicatory proceeding” under G.L. c. 30A, § 1(1) because the legal rights of the Company are required by both constitutional law and statutory law to be determined after an opportunity for an agency hearing.

As noted previously, the legal rights at issue in this proceeding are related to the Company’s property rights. The Company’s property rights are protected by both Article XIV of the United States Constitution and Article X of the Massachusetts Constitution. The Supreme Judicial Court has recognized the existence of a constitutional right to a hearing in instances where administrative decisions directly affected the personal rights, property, or economic interests of the applicant. See Cella, Administrative Law and Practice § 1759, quoting Milligan v. Board of Registration in Pharmacy, 348 Mass. 491 (1965) and Marmer v. Board of Registration of Chiropractors, 358 Mass. 13 (1970).

Accordingly, because the Company’s property rights are at issue in this proceeding, the Department properly held an evidentiary hearing on April 11, 2002, allowing the Company and Waltham to present evidence to the Department and cross-examine each party’s witnesses. Although Waltham has argued in its Response that the April 11 hearing was discretionary on behalf of the Department (Waltham Response at 5),³ to the extent that the Department issued an order in this proceeding that directed the Company to pay a refund to Waltham, without the opportunity for an evidentiary hearing, the Department would have denied the Company its property rights without due

³ Waltham’s references to cases involving Massachusetts Electric Company (D.T.E. 00-37 and D.T.E. 98-76) are inapposite because in both proceedings Massachusetts Electric Company voluntarily agreed to proceed without an evidentiary hearing. See Waltham Response at 4-5. In neither case does Waltham cite to an admission by Massachusetts Electric Company nor a finding by the Department that the dispute-resolution process is not an adjudicatory proceeding, which would require a hearing if requested by a party.

process of law. See Boston Gas Company v. Department of Public Utilities, 368 Mass. 51, 54, 329 N.E. 2d 712, 715 (1975). Accordingly, because the Company's property rights are at issue in this proceeding, the Department properly conducted an evidentiary hearing, consistent with the requirements of the United States and Massachusetts' Constitutions. Moreover, because the opportunity for an agency hearing is required in this case, the proceeding meets the definition of an "adjudicatory proceeding" under G.L. c. 30A.

The provisions of G.L. c. 164, § 34A that are the subject of this proceeding were enacted as part of St. 1997, c. 164, the Electric Restructuring Act of 1997 (the "Act"). The Act established a comprehensive set of structural changes in the electric industry, of which the requirement for the sale of municipal streetlighting is only one aspect. In establishing analogous dispute-resolution requirements, the Legislature made it clear that such proceedings required the opportunity for a formal adjudicatory hearing process. The Act authorizes and directs the Department to establish rules and regulations to:

(1) promote effective competition; (ii) investigate disputes; (iii) institute a complaint mechanism for the resolution of disputes...; (iv) ...hear such disputes in the first instance at an informal level and, if requested, at a formal hearing before the Department...

St. 1997, c. 164, § 193 (codified at G.L. c. 164, § 1F(3) (emphasis added)). Accordingly, the statutory mandate for the institution of a formal hearing process, if informal dispute-resolution attempts do not succeed, is clearly contemplated and provided for in the Act.

In this proceeding, the Company requested a hearing before the Department regarding the issues in the case and the Department granted the Company's request, consistent with the requirements of state law. The Department should recognize this statutory directive in the context of this proceeding, and other similar proceedings, to

ensure that disputes regarding streetlight conversions are accorded the same level of procedural due process as other Department proceedings where the legal rights of electric companies and municipalities are at issue.

c. Conclusion

As outlined above, the Company meets the Department's definition of "party" under subsection (a) of 220 C.M.R. 1.03(2) because: (1) the Company is a specifically named person whose legal rights are being determined in this proceeding; and (2) the proceeding is an "adjudicatory proceeding" as defined in G.L. c. 30A, §1(1). This proceeding meets the definition of an "adjudicatory proceeding" under G.L. c. 30A, § 1(1) because the Company's legal rights are required by constitutional right and by the General Laws to be determined after opportunity for an agency hearing. Accordingly, Waltham's procedural objections to the filing of the Motion to Dismiss are without merit.⁴

B. Waltham Has Failed to State a Claim Upon Which Relief May Be Granted

The Petition fails to state a claim upon which relief may granted and, thus, the Department should dismiss the Petition. On January 24, 2002, Waltham filed its Petition with the Department alleging that the Company's methodology for allocating its investment and depreciation for Waltham's streetlights was "inequitable" (Petition at ¶ 14). The Petition was signed only by counsel for Waltham. Waltham offered no

⁴ Waltham also cites to 220 C.M.R. 2.08, Advisory Ruling, in support of its claim that the Department may interpret statutory provisions outside of the context of an adjudicatory proceeding. Section 2.08 of the Department's regulations have no bearing on this case, since the issuance of such rulings is purely discretionary on the part of the Department and the ruling is not binding on either parties or the Department. Millennium Power Partners, LP, D.T.E. 98-19, at 5 (1998). This case was brought by Waltham as a dispute-resolution proceeding in which the Department is required to adjudicate the rights of parties to the dispute, not opine generally on the interpretation of law.

calculations or testimony from an expert witness supporting its allegation that the Company's allocation methodology was "inequitable." More importantly, Waltham provided no proposal, calculation or other indication of how an "equitable" calculation should be accomplished. In addition, pursuant to a conference call with the Department on February 15, 2002 and a subsequent Hearing Officer's memorandum on the same date, the Hearing Officer in this proceeding offered Waltham the opportunity to file, by February 22, 2002, testimony to support its Petition. See City of Waltham, D.T.E. 02-11 (Hearing Officer's Memorandum at 1, February 15, 2002). However, Waltham filed additional argument regarding its allegations, but without supporting testimony from an expert witness (see Waltham "Response to Information Request," February 20, 2002 and Waltham's Response to the Company's Answer, February 28, 2002).

Finally, at the evidentiary hearing conducted by the Department on April 11, 2002, Waltham was given one final opportunity to present a case in support of its Petition. Waltham presented a witness who admittedly has no background or training in the valuation of utility property, utility ratemaking, or accounting (Tr. 1, at 8, 20). As such, he was unable to answer any questions with regard to the accounting issues that are the subject of this proceeding or explain why the Company's calculation is unfair (Tr. 1, at 21-23). Thus, despite numerous opportunities to present its case, Waltham has failed to allege or state sufficient facts that would entitle Waltham to relief or even to articulate precisely what relief it seeks.

Although the Department, in reviewing a Motion to Dismiss, construes the facts and allegations asserted in favor of the non-moving party, the Department's standard of

review of motions to dismiss states that dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988). This standard is based on the standard for motions to dismiss articulated by the Supreme Judicial Court in Conley et al. v. Gibson et al., 355 U.S. 41, 45-46 (1957).

To date in this proceeding, Waltham has merely claimed that the Company's allocation methodology is "inequitable" and asks the Department to "direct the Company to recalculate [its purchase price for streetlights] by allocating a percentage of the net investment in accounts 632, 633, 634 and 637 to account 636 in a fashion that is rationally and equitably based on the percentage of 'Account 636' streetlight equipment in the City [of Waltham]" (Petition at ¶ 15). The Company has repeatedly demonstrated, through pre-filed testimony, responses to information requests and oral testimony why its methodology comports with reasonable accounting and ratemaking principles. Waltham has not alleged or proffered any evidence to refute that methodology. Nor did Waltham state a claim to support an alternative methodology. Waltham therefore has not presented a prima facie case why it is entitled to relief, and the Department should grant the Company's Motion to Dismiss.

III. CONCLUSION

The Department should reject Waltham's claims that the Company is not entitled to move to dismiss this proceeding. The Company may move to dismiss this proceeding pursuant to 220 C.M.R. 1.06(e) either: (1) at the discretion of the Hearing Officer, to the extent that the Department determines that the Company is not a party to this proceeding; or, alternatively; (2) as a "party" to the proceeding. Moreover, the Department should dismiss Waltham's Petition because Waltham has failed to state a claim upon which relief may be granted. Despite ample opportunity given by the Department to support its Petition with expert testimony or other evidence to justify directing the Company to recalculate the purchase price of Waltham's streetlights, Waltham has failed to allege or provide such evidence to the Department. Accordingly, the Company respectfully requests that the Department grant the Company's Motion to Dismiss this proceeding.

WHEREFORE, the Company requests that the Department:

1. Dismiss the Petition; and
2. Grant such other relief as the Department deems necessary and appropriate.

Respectfully submitted,

**BOSTON EDISON COMPANY d/b/a
NSTAR ELECTRIC**

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